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No. 90-1167

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, *et al.*,
Petitioners,

v.

DAVID LUCAS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners the Board of Public Education and Orphanage for Bibb County, *et al.* (the "Board" or "School Board") respectfully submit this Reply Brief.

I. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS RIPE FOR REVIEW.

This case is ripe for review. The Eleventh Circuit's decision that respondents may maintain a cause of action under § 2 of the Voting Rights Act to challenge the decision of a validly-elected school board raises a clear-cut and important legal issue. Since the Eleventh Circuit's ruling is inconsistent with both the position of the Attorney General and this Court's summary affirmance of the § 5 claim in this case, immediate review is appropriate.

Respondents erroneously argue that because there has not yet been a trial on the merits, this case is not ripe for review by this Court. On the contrary, this Court has repeatedly granted petitions for writs of certiorari to review *before trial* decisions involving important legal issues "fundamental to the further conduct of the case." *E.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (granting certiorari, before trial, to determine whether the Jones Act provides the exclusive right of action for wrongful death of a seaman killed in territorial waters of a state); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (granting certiorari, before trial, to determine whether the suit was barred under the doctrine of sovereign immunity); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same).

The Court has been particularly willing to review cases before trial to determine whether a claim states a cause of action. *See Gillespie*, 379 U.S. at 153; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975) (granting certiorari, before trial, to determine whether the offerees of a stock offering who had neither purchased nor sold any of the offered shares may maintain a private cause of action for money damages under Rule 10b-5 of the Securities and Exchange Commission); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (granting certiorari, before trial, to determine whether a state inmate may maintain a cause of action under 42 U.S.C. § 1983 against the state corrections department medical director for inadequate treatment of a back injury).

These precedents leave no doubt that the Eleventh Circuit's decision in this case is ripe for review. The legal issue whether respondents may maintain a cause of action under § 2 of the Voting Rights Act to challenge the School Board's decision to submit a comprehensive capital improvement plan to the voters in a single bond issue is unquestionably "fundamental to the further conduct of the case." *Larson*, 337 U.S. at 685 n.3.

Moreover, the Eleventh Circuit's nullification of the bond issue has prevented the School Board from proceeding with its capital improvement plan. Local governments certainly need not await lengthy discovery and trial before challenging a federal court of appeals' intervention in local government operations. As Justice Powell observed in *City of Rome v. United States*:

> Unless the federal structure provides some protection for a community's ordering of its own democratic procedures, *the right of each community to determine its own course within the boundaries marked by the Constitution is at risk.* . . . Federal review of local voting practices reduces the influence that citizens have over policies directly affecting them, *and strips locally elected officials of their authority to chart policy.*

446 U.S. 156, 201 (1980) (Powell, J., dissenting) (emphasis added). Justice Powell's concerns in *City of Rome* are amplified here. Ignoring the views of the Attorney General and this Court's summary affirmance under § 5 in this same case, the Eleventh Circuit has improperly encroached on the authority of the School Board to manage the schools in Bibb County.

The School Board respectfully requests the Court to grant certiorari to resolve the inconsistent interpretations of § 2 and § 5 of the Voting Rights Act in this case and to protect the Board from improper encroachment by the federal courts.

II. THE COURT OF APPEALS' DECISION IS NOT FACT SPECIFIC AND AFFECTS THOUSANDS OF LOCAL GOVERNMENTAL BODIES THROUGHOUT THE UNITED STATES.

Contrary to respondents' assertion (Respondents' Brief in Opposition at 19), the issue whether respondents may challenge a validly-elected school board's decision as to what bond issue(s) to propose to the voters affects thou-

sands of local governmental bodies throughout the United States. Many, if not all, states require that voters approve decisions of local governmental bodies to incur bonded debt. *See generally* 64 Am. Jur. 2d *Public Securities and Obligations* § 132 (1984). Last year alone there were more than 4,000 general obligation bond issues in the United States, totalling more than $40 billion. Of those bond issues, over 1700—in an amount in excess of $10 billion—were earmarked for education. *American Banker Bond Buyer Yearbook 1991* pp. 23 and 99.

Bond issues plainly are an essential tool of local government. If the Eleventh Circuit is correct that "[m]inority communities have the right to vote for or against the *propositions of their choice*," 908 F.2d at 858. (App. A at 14a) (emphasis added), then many necessary and worthwhile projects throughout the country will be victims of protracted Voting Rights Act litigation.[1] This Court should grant certiorari to prevent this unfortunate result.

III. THE DATE OF THE ELECTION IN THIS CASE WAS SPECIFICALLY PRE-CLEARED BY THE ATTORNEY GENERAL AND IS NOT AT ISSUE.

Throughout their brief, respondents attempt to create the erroneous impression that petitioners manipulated the date of the bond issue election to assure low black voter turnout in violation of the Voting Rights Act. (Respondents' Brief in Opposition at 6-10, 15, 19). On the contrary, it is undisputed that the Board scheduled the referendum in this case for November 8, 1988, "the date of the general election, including the presidential elec-

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[1] Indeed, in this case the Board's comprehensive capital improvement plan has never even begun. The 17 new air conditioning systems, which respondents admit that they desired *and which were part of the comprehensive plan approved by the majority of the voters*, are still needed. Likewise, the new schools that were to be funded under the plan have not been built.

tion." *Lucas v. Townsend*, 908 F.2d 851, 853 (11th Cir. 1990) (App. A at 4a). *It is also undisputed that the Attorney General specifically pre-cleared the election date.* 908 F.2d at 853 (App. A at 4a). Respondents' discussion of the election date is very misleading and totally irrelevant to the issues presented in the Board's petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF PUBLIC EDUCATION AND ORPHANAGE FOR BIBB COUNTY, ET AL., PETITIONERS

v.

DAVID LUCAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a school board's decision to include funding for several projects in a single bond issue referendum question is a "standard, practice, or procedure" under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. On December 17, 1987, petitioner Board of Public Education and Orphanage for Bibb County (the Board) voted to place a bond referendum on the ballot on March 8, 1988, the day of the "Super Tuesday" presidential primaries in certain southern States.[1] The bonds were proposed to finance air conditioning at county schools. A few weeks later, the Board voted to postpone the referendum until May 31, 1988. It

[1] Bibb County is located in central Georgia. See Pet. 8 n.2.

also voted to increase the amount of the bond issue so that the referendum would finance not only the air conditioning project, but also the construction of additional schools. Pet. App. 2a-3a; Br. in Opp. App. 7A-8A.

The Board requested preclearance from the Attorney General for the May 31 referendum, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which requires, in pertinent part, that covered jurisdictions receive preclearance from the Attorney General or the United States District Court for the District of Columbia for changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." On May 25, 1988, the Attorney General informed the Board that he could not preclear the referendum without further information. Pet. App. 3a.

2. On May 27, 1988, respondents—black citizens registered to vote in Bibb County—filed suit under (1) Section 2 of the Voting Rights Act, 42 U.S.C. 1973; (2) Section 5 of the Voting Rights Act, 42 U.S.C. 1973c; and (3) 42 U.S.C. 1983 and the First, Thirteenth, Fourteenth, and Fifteenth Amendments. Alleging that their statutory and constitutional rights had been violated by petitioners in connection with the call for a bond issue referendum, they requested declaratory and injunctive relief. Pet. App. 4a; Br. in Opp. 3.

3. With regard to Section 5, respondents alleged that petitioners had failed to comply with the Section 5 requirement that covered jurisdictions obtain preclearance.

a. Respondents requested a preliminary injunction to enjoin the referendum pending the Board's com-

pliance with the Section 5 preclearance requirement. They pointed out that, under the Attorney General's regulations, the discretionary scheduling of a special election requires preclearance. 28 C.F.R. 51.17. On May 27, 1988, the same day that respondents filed their complaint, a three-judge court convened under Section 5 nevertheless denied respondents' request for a preliminary injunction. Br. in Opp. App. 1A-6A. The court held that the scheduling of a special election was not a "change" under Section 5 and had no potential for discrimination. *Id.* at 4A-5A.

b. Respondents sought an injunction from this Court, and the United States filed a memorandum supporting their request. On May 30, 1988, Justice Kennedy issued an injunction pending appeal. Br. in Opp. App. 7A-11A; 486 U.S. 1301. He determined that, in light of the Court's precedents, the district court's ruling that the setting of the date for a special election was not subject to Section 5 preclearance was "most problematic." Br. in Opp. App. 11A; 486 U.S. at 1305. He further concluded that "four members of the Court would likely vote to note probable jurisdiction," that there was a "fair prospect" that the full Court would vote to reverse, and that irreparable harm likely would flow from denying injunctive relief. Br. in Opp. App. 11A; 486 U.S. at 1305.

The postponement resulting from the injunction rendered the appeal moot, and the appeal was subsequently dismissed. Pet. App. 4a.

4. On June 9, 1988, the Board approved a $29 million bond referendum for the air conditioning project, school construction, and a magnet school program. It scheduled the referendum for November 8, 1988, the next general election date, and submitted and obtained preclearance from the Attorney General

for this scheduling decision. In October 1988, respondents again moved the three-judge court for a preliminary injunction, pursuant to Section 5, to enjoin the referendum; they argued that Section 5 required the Board to obtain preclearance not only for the date, but also for the "form" of the question, that is, the decision to combine funding for several projects into a single question. Pet. App. 4a-5a.

In light of the "novel nature" of respondents' contentions and the absence of authority on point, the three-judge court invited the Attorney General to submit the views of the United States on this issue. Pet. App. 42a. The United States submitted a brief as amicus curiae in which it argued:

> Here, the facts of record would tend to suggest that the defendants' discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance. Selecting a number of projects to be financed under one bond authority would seem to be a normal legislative decision unrelated to the process of holding elections. It is essentially the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the board is willing to pay or the term of the bonds.

District Ct. Amicus Br. 16-17.

Agreeing with this reasoning and noting that the Attorney General's interpretations of Section 5 are entitled to particular deference (Pet. App. 41a-43a), the district court denied respondents' motion on November 2, 1988. The court held that "the form or structure of a question on a bond referendum is not a standard, practice, or procedure affecting voting." *Id.* at 43a. In addition, the court ruled that the

Board's exercise of discretion in formulating the question for the referendum was not a "change" for purposes of Section 5. *Ibid.*

5. On November 8, 1988, the referendum took place as scheduled. The question presented to the voters read, in its entirety, "SHALL GENERAL OBLIGATION SCHOOL BONDS IN THE AMOUNT OF $29,000,000 BE ISSUED BY BIBB COUNTY?" The referendum carried by a narrow majority. Pet. App. 5a; U.S. Amicus Br. at 7, *Lucas* v. *Townsend*, No. 89-400.

6. a. By order of March 7, 1989, the three-judge district court entered a final judgment for petitioners on the Section 5 challenge, relying on the reasons set forth in its decision denying respondents' October 1988 motion for a preliminary injunction; the order also dissolved the three-judge court. Pet. App. 44a-45a.

b. On appeal, this Court invited the views of the United States, and the federal government submitted an amicus brief urging summary affirmance on the ground that the three-judge court had correctly ruled that the Board's decision was not a "standard, practice, or procedure" for purposes of Section 5. The United States argued that the decision under challenge was best characterized as "a question of educational and fiscal policy" rather than "a voting matter within the purview of Section 5." U.S. Amicus Br. at 11, *Lucas* v. *Townsend*, *supra*. The United States further pointed out that the argument in favor of coverage had too broad a reach, since it would render every decision about "the wording and scope of a bond referendum * * * a 'standard, practice, or procedure with respect to voting.'" *Id.* at 12.

This Court summarily affirmed the district court's judgment on January 22, 1990. Pet. App. 46a; 110 S. Ct. 858.

7. a. In March 1989—after the three-judge court's Section 5 decision, but before this Court's summary affirmance—respondents requested relief from the single-judge district court pursuant to Section 2, arguing that the Board's decision to combine funding for several projects in one question had resulted in black voters having less opportunity to cast an effective vote to fund the project of their choice. Respondents maintained that the three-judge court's Section 5 decision did not preclude acceptance of their theory under Section 2 because the scope of the phrase "standard, practice, or procedure" in Section 2 was broader than the scope of the identical language in Section 5. Pet. App. 18a-19a.

b. In June, 1989, the district court rejected respondents' arguments and denied their Section 2 claims. Pet. App. 17a-35a.[2] The court drew a distinction between decisions regarding the "method" of offering issues for approval by referendum, which would be covered by the Voting Rights Act, and discretionary legislative policy decisions, which would not be covered. Pet. App. 24a. The district court concluded that respondents had failed to establish that the Board's decision had been of the former rather than the latter type. The court found that respondents had presented no evidence that the Board's decision involved a policy or formula for determining the manner in which to present the referendum question.

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[2] The district court entered an order, titled "FINAL JUDGMENT," on June 8, 1989 (see App., *infra*, 1a), which stated that judgment was entered for petitioners on respondents' "claims under Section 2 of the Voting Rights Act."

Id. at 30a. Instead, "the evidence suggests that the decision to submit the proposed improvements to the voters in one question rather than in two or more questions was a singular decision premised upon the facts of this particular situation." *Ibid.* In making the decision, the Board was carrying out its representative mission to "pursue an agenda which benefits the community at large." *Id.* at 31a. The district court believed that in this respect the Board should "be afforded some freedom to engage in the traditional political tools of consensus-building and compromise to effectuate comprehensive plans for school and community development and improvement." *Id.* at 30a.

The district court further explained that "[t]o accept plaintiffs' position in this matter is to invite chaos. Any and all matters which are to be submitted to the electorate for its approval or disapproval * * * would be subject to challenge under the Voting Rights Act." Pet. App. 31a. As respondents had conceded in argument before the three-judge panel in the Section 5 proceedings, their theory of the case would render every decision about the construction of a referendum question a "standard, practice or procedure" under the Voting Rights Act. *Id.* at 31a-33a n.9.[3]

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[3] The district court also reasoned that the Board's decision to combine two projects into one referendum question could not affect minorities' opportunity to cast an effective ballot because "every individual qualified to vote * * * had the opportunity to express his or her approval or disapproval of the bond issue." Pet. App. 34a. The court thus concluded, as an alternative basis for its holding, that even if the Board decision was a "standard, practice, or procedure" it did not "affect voting." *Id.* at 35a.

c. On appeal, a divided panel of the Eleventh Circuit reversed. Pet. App. 1a-16a.[4] That court rejected the Board's contention that, with respect to the "standard, practice or procedure" issue, the Eleventh Circuit was bound by this Court's summary affirmance in the Section 5 case. *Id.* at 7a-9a. The court stated that this Court "may have" summarily affirmed the order dismissing respondents' Section 5 claims on the ground that the Board's decision did not constitute a "change" for purposes of Section 5, rather than that it did not implicate a "standard, practice, or procedure affecting voting." *Id.* at 9a.

The court then proceeded to decide, "as a matter of first impression," that "combining multiple bond projects in a single referendum" constitutes a "standard, practice, or procedure" with the potential to abridge minority voting rights under Section 2. Pet. App. 10a, 14a. The court acknowledged that it owed deference to the Attorney General's interpretation of Section 5, but held that "[w]e do not afford the Attorney General's interpretation of section 5 the same deference in resolving claims under section 2." *Id.* at 12a. The court stated that it could not agree with the Attorney General's characterization of the Board's decision as a policy determination analogous to setting the amount of debt to incur. *Id.* at 13a. Instead, the court concluded, the decision was better characterized as "a political decision with the potential for diluting or submerging the minority vote." *Ibid.* The court reasoned that the Board's decision to combine projects in one referendum "forced minority voters supporting one project to either vote in favor

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[4] Judge Roney dissented and would have affirmed the district court's judgment for the reasons stated in its opinion. Pet. App. 16a.

of other projects they might not support, to abstain from voting, or to vote against the project they supported." *Ibid.*[5]

The court of appeals held that it would not reach the merits of respondents' claims under Section 2 because the district court had not considered this issue. The court thus remanded the case to the district court for further proceedings on the merits. Pet. App. 15a.

In addition to their Section 2 challenge, respondents also advised the court of appeals that the district court had not decided their constitutional claims and argued that their constitutional rights had been violated. Resp. C.A. Br. 16, 31-32. Petitioners replied that respondents had waived their constitutional claims by not pursuing them in the district court. Pet. C.A. Br. 14. The court of appeals did not resolve this issue; it stated that, on remand, the district court should consider whether respondents' constitutional claims had been waived. Pet. App. 15a-16a n.7.

A petition for rehearing and a suggestion of rehearing en banc were denied. Pet. App. 36a-37a.

DISCUSSION

At the outset, we note that there is a possible defect in the court of appeals' jurisdiction. If not for this jurisdictional problem, we would conclude that the case warrants review, and would recommend

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[5] The court acknowledged that its approach would render all decisions to present multiple proposals in a single referendum question subject to litigation under Section 2, but pointed out that, under its reasoning, the identical decision would be excluded from coverage under Section 5 because no "change" would have taken place. Pet. App. 15a.

granting certiorari. In light of the serious jurisdictional question, however, we recommend granting the petition, vacating the court of appeals' decision, and remanding for clarification of the jurisdictional issue.

1. The jurisdictional problem arises from the fact that respondents' constitutional claims may not have been finally resolved in the district court. It is axiomatic that a court of appeals has jurisdiction—with exceptions not applicable here—only over orders of a district court that constitute "final decisions." 28 U.S.C. 1291. An order that resolves only one of multiple claims is not appealable as a final judgment, absent certification by the district court under Fed. R. Civ. P. 54(b).[6] See *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 3, 7-8 (1980); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431-438 (1956); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2660 (2d ed. 1983). See also *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 583-584 (1980); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742-744 (1976).

Here, although respondents purported to appeal from the district court's "final judgment" (see note 2, *supra*), that order and the accompanying opinion disposed only of respondents' Section 2 claim. See Pet. App. 35a. The district court made no mention of respondents' claims under 42 U.S.C. 1983 and the First, Thirteenth, Fourteenth, and Fifteenth Amendments, which respondents had included in their complaint and in their proposed pretrial order. See Pet. App. 15a-16a n.7. Indeed, as noted, respondents themselves specifically stated in the court of appeals

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[6] The district court issued no such Rule 54(b) certification in this case.

that the district court "did not rule upon [respondents'] constitutional claims" (Resp. C.A. Br. 16) and that the district court "did not [d]ecide" those claims. *Id.* at 31. See also Br. in Opp. 5 n.2. The court of appeals, moreover, did not determine whether the district court had, in fact, resolved respondents' constitutional claims—a determination essential to establishing the court of appeals' jurisdiction. If, in fact, respondents' constitutional claims remained outstanding at the time the district court entered its June 8, 1989, judgment, that judgment was not an appealable order; the court of appeals lacked jurisdiction to enter the order on the merits from which review is now sought; and this Court would be unable to reach the merits of the question presented. See, *e.g.*, *Liberty Mut. Ins. Co.*, 424 U.S. at 740.

In light of this serious jurisdictional problem, we recommend that the Court grant, vacate, and remand for clarification of the jurisdictional issue.[7]

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[7] The court of appeals, of course, has jurisdiction to consider its jurisdiction, and this Court has jurisdiction for the same purpose. See, *e.g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). On remand, the court of appeals could either determine for itself whether a waiver of the constitutional issues had occurred or remand to the district court for that determination. In either event, if a waiver in the district court is established, appellate jurisdiction would be proper because no claims would remain outstanding in the district court, and the court of appeals could then enter an appropriate judgment and decision. If no waiver is established, however, the district court must either resolve the constitutional claims or issue a Rule 54(b) certification to permit appellate consideration of the Section 2 decision.

We note that both parties believed that appellate jurisdiction was proper in the court of appeals, and both cited 28 U.S.C. 1291 as the basis for jurisdiction. See Resp. C.A. Br.

2. As noted, but for the possible jurisdictional problem, we would recommend plenary review.[8] The court of appeals' decision is incorrect; it is, at the very least, in considerable tension with this Court's prior summary affirmance in this same litigation; and it has potentially broad ramifications.

a. The decision below is wrong. For the reasons set forth in the brief we filed in response to this Court's invitation in the Section 5 appeal in this case, the wording of a bond referendum is not a "standard, practice, or procedure" for purposes of the Voting Rights Act. See U.S. Amicus Br. at 7-13, *Lucas* v. *Townsend*, *supra*. As we explained in that filing, the quoted language includes enactments affecting the casting of a ballot and the effectiveness of a vote, but does not include legislation unrelated to voting. The Voting Rights Act protects the right to vote; it does not address the content of substantive legislation unrelated to voting, such as what budget to approve or what programs to fund. There is thus a fundamental distinction between a "standard, practice or proce-

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viii; Pet. C.A. Br. 1. In view of the fact that respondents have requested injunctive relief, the court of appeals may also wish to consider the possible applicability of 28 U.S.C. 1292(a); we doubt, however, that the provision affords a basis for jurisdiction in this case. See, *e.g.*, *Stringfellow* v. *Concerned Neighbors In Action*, 480 U.S. 370, 379 (1987) ("This Court has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a serious, perhaps irreparable, consequence, and that the order can be effectually challenged only by immediate appeal.") (internal quotation marks omitted).

[8] Indeed, if the Court concludes, contrary to our submission, that no serious jurisdictional question is presented, then we recommend that the Court grant certiorari.

dure" affecting voting and a policy decision that does not concern voting. See *id.* at 8-10.

As we further explained in our prior filing, the Board's decision in this case to combine several projects into a single referendum question is not a "standard, practice, or procedure" under the Voting Rights Act, but rather a question of educational and fiscal policy. The Board decided to fund all the projects at once or not at all; this is a policy decision no different from a legislative decision to include a certain combination of projects in an appropriations bill, or none at all. Neither is covered by the Voting Rights Act. See U.S. Amicus Br. at 11, *Lucas* v. *Townsend*, *supra*.

b. The decision below is also, at the very least, in considerable tension with this Court's summary affirmance of the Section 5 appeal in this litigation. Contrary to the Eleventh Circuit's supposition (see Pet. App. 7a-9a, 15a), it is unlikely that this Court's affirmance rested on the ground that the Board's discretionary decision was not a "change." The "Questions Presented" in the Jurisdictional Statement in that appeal did not squarely present this issue for review. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance rejects "specific challenges presented in the statement of jurisdiction"). In addition, the United States argued that this Court need not consider whether the district court had correctly ruled that the decision under challenge was not a "change" under Section 5, noting that prior authority of this Court pointed to the opposite conclusion. See U.S. Amicus Br. at 13-14 n.9, *Lucas* v. *Townsend*, *supra* (citing *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985)). It thus appears far more likely that this Court affirmed the judgment on the basis of the district

court's conclusion that respondents had failed to show a "standard, practice, or procedure" on the facts of this case. See *Mandel*, 432 U.S. at 176 (summary affirmance should be interpreted "as applying principles established by prior decision to the particular facts involved," rather than as "breaking new ground").

The fact that the present proceedings arise under Section 2 rather than Section 5 does not undermine the precedential force of this Court's prior ruling. Section 2 and Section 5 use identical language to define the scope of coverage: "standard, practice, or procedure." The close relation between Section 2 and Section 5 presents "a classic case for application of the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990), quoting *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (further quotations omitted).[9]

The court of appeals' decision not only rejected the most likely basis for this Court's summary affirmance; it also apparently interpreted the Court's summary affirmance to mean that the wording of the

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[9] The court of appeals stated that, in view of its interpretation of this Court's summary affirmance, it did not need to consider whether the phrase "standard, practice, or procedure" has a broader scope under Section 2 than under Section 5. Pet. App. 9a n.6. The court of appeals' decision fails, however, to address the three-judge court's determination that the content of the bond referendum at issue in this case was not a "standard, practice, or procedure" under Section 5. See Pet. App. 43a. The court of appeals' decision thus either squarely conflicts with the three-judge court's conclusion, or necessarily rests on the flawed proposition that the language in Section 2 has a broader scope than the identical language in Section 5.

bond referendum was not a "change" sufficient to trigger Voting Rights Act coverage. Pet. App. 9a, 15a. We have considerable concern about such a holding and strongly doubt that this Court intended it; the result of the court of appeals' decision, however, is that the Eleventh Circuit now seems to have interpreted this Court's decision as standing for that proposition.

c. The decision below is also of broad significance. As we pointed out in our amicus brief in the Section 5 appeal, the potential reach of respondents' theory is enormous. Respondents' theory would potentially extend Voting Rights Act coverage to the wording and scope of every bond referendum. See U.S. Amicus Br. at 12, *Lucas* v. *Townsend*, *supra*. See also Pet. App. 31a-33a n.9. Given the enormous possible impact of the holding below, this Court's review would be appropriate, absent a jurisdictional problem, to decide the Section 2 coverage question.

d. There are, we recognize, other factors militating against review by this Court at this time. The question presented is a novel one; petitioners cite and we are aware of no other cases presenting the issue. There is, accordingly, no conflict among the circuits. In addition, the fact that the decision is interlocutory —because the court of appeals remanded for a trial on the Section 2 claim—counsels against review. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327 (1967). Petitioners would have an opportunity to raise the issue on which they seek this Court's review on appeal from the district court's disposition of respondents' Section 2 claims after trial.

At the same time, there is at least considerable tension between the decision below and this Court's prior summary affirmance, and the question presented in-

volves a preliminary matter of coverage not likely to benefit from proceedings at trial. We understand this Court to have already decided the question presented under Section 5; it would seem curious to allow further percolation of the issue under Section 2 in the circuits if that is indeed the case. For these reasons, we submit that, if there were no jurisdictional problem, plenary review would be appropriate at this time.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for clarification of the jurisdictional issue.

Respectfully submitted.

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JUNE 1991

APPENDIX

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Civil Action No. 88-166-1-MAC(WDO)

DAVID LUCAS, ET AL., PLAINTIFFS

vs.

JUDY TOWNSEND, ET AL., DEFENDANTS

FINAL JUDGMENT

Pursuant to this Court's order dated June 7, 1989, and for the reasons stated therein,

JUDGMENT is hereby entered in favor of defendants and against plaintiffs on plaintiffs' claims under Section 2 of the Voting Rights Act.

This 8th day of June, 1989.

/s/ Gregory J. Leonard
GREGORY J. LEONARD
Clerk